No. 76-332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, CONTINENTAL TELEPHONE CORPORATION, UNITED TELEPHONE COMPANY OF THE CAROLINAS and the UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Page

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Petitioners, representing three major telephone systems in the United States,[1] and the national trade association representing the approximately 1,600 independent telephone companies request that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit in this case.

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[1] These petitioners are American Telephone and Telegraph Co. ("AT&T") and its 23 associated Bell System operating companies, Continental Telephone Corporation, and two companies (United Telephone Company of the Carolinas and Carolina Telephone and Telegraph Company) which are part of the United System.

OPINIONS BELOW

The decision of the Court of Appeals, which is not yet officially reported, appears at Appendix A to this petition.[2] It affirmed, by a 2-to-1 vote, the decision of the Federal Communications Commission, which is reported at 45 F.C.C.2d 204, and appears at Appendix B.

JURISDICTION

The judgment of the Court of Appeals, which was filed on April 14, 1976, appears at Appendix C. Timely filed petitions for rehearing and rehearing *en banc* were denied on June 8, 1976, by orders which appear at Appendix D.[3] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

In a radical departure from the pattern of regulation which has existed for over 50 years, the Federal Communications Commission in this case has asserted plenary power to regulate the terms and conditions of the connection of over 100 million pieces of telephone terminal equipment to local telephone exchanges; and it has purported to deprive the states of power to follow their independent policies, despite the uncontroverted facts that the states have pervasively regulated this field for over 50 years and that such equipment is and has been used over 95 percent of the time for intrastate and exchange communications. The

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[2] The appendices are separately bound in a companion volume which is cited as "Pet. App."

[3] The Court of Appeals denied rehearing by a 1-to-1 vote and rehearing *en banc* because all other active-service judges were disqualified.

question presented by the FCC's purported action is one of Congressional intent and not of constitutional power, that is, the issue is *not* whether Congress could constitutionally have granted the FCC the power it purports to exercise but whether it *did* grant that power. The question is:

Does the FCC's assertion of jurisdiction over such equipment and its preemption of the authority of state agencies violate Congress' express intent to preserve state jurisdiction and the explicit mandate of the Communications Act that (apart from radio licensing), "nothing in this Act" shall "apply or give the Commission jurisdiction with respect to facilities . . . for or in connection with intrastate communications service" (Section 2(b)(1)) or "with respect to facilities . . . for or in connection with . . . telephone exchange service . . . even though a portion of such exchange service constitutes interstate or foreign communications" (Section 221(b)).

STATUTES INVOLVED

Pertinent provisions of the Communications Act and representative state regulatory provisions appear at Appendix E.

STATEMENT OF THE CASE

This case presents a basic issue of federal statutory construction involving the relationship between federal and state regulation. It will also determine whether regulatory jurisdiction over more than 100 million telephones and other pieces of terminal equipment is shifted from the states, which have regulated the field pervasively for over 50 years, to the FCC, which has now sought to preempt state authority.

Although state regulatory commissions are most directly affected by this federal assertion of jurisdiction drastically curtailing their authority, the decision below leaves the telephone companies who are responsible for service to the public in an untenable position: On the one hand the FCC has preempted jurisdiction over the connection of telephone terminal equipment while on the other the states continue to regulate the rates and services with respect to the very same local exchange facilities. The regulation of rates, services and facilities is inextricably intertwined and Congress recognized this fact when it deliberately assigned to the states and not to the FCC jurisdiction over "charges . . . services, facilities or regulations" for or in connection with intrastate and exchange communication service.

The FCC's decision, if permitted to stand, would drastically alter the Congressional distribution of power between state and federal agencies over communications common carriers and cause equally extreme changes in the manner in which the carriers provide the communications essential to the economic vitality of this country. The majority opinion below in affirming the FCC's action, has manifestly misconstrued the plain language of Sections 2(b)(1) and 221(b); and the opinion is inconsistent with this Court's basic approach to statutory construction. It would divest the states of their longstanding and pervasive authority over terminal equipment directly contrary to Congress' repeatedly expressed purpose to preserve existing state jurisdiction.

A. The Nature and Regulation of Telephone Service in the United States

The local telephone exchange is the basic unit through which telephone service has been provided in the United States. Within the local exchange area, service is provided by using local lines ("loops") to link "terminal" equipment—telephones, switchboards, answering devices, etc.—ordinarily located in a home or business to central office switching facilities located at the telephone company's central office in the local exchange area.[4] Telephones and other terminal equipment in the exchange area are connected with one another through the switching equipment at the central office.[5] A local exchange with a single central office can readily be visualized as a rimless wheel with a telephone at the end of each spoke and with all communications passing through the hub which interconnects the spokes.

For long distance calls, local exchanges in different cities are themselves connected through a complex network of intercity lines, which may be cables, microwave channels or other types of long distance transmission facilities. Ordinarily, long distance calls are routed between local exchanges along these intercity lines by toll switching equipment designed to handle

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[4] A small local exchange may be served by a single central office while a larger local exchange may use a number of interconnected central offices within the local exchange area. There are thousands of exchange areas in the fifty states.

[5] The principal local exchange facilities—the central office switching equipment, local loops, and terminal equipment—function as an integrated unit. The telephone generates signals (*e.g.*, through dialing) which travel along the same loops that carry the conversations and which operate the switching equipment at the central office.

inter-exchange traffic. These intercity lines comprise over 250 million circuit miles, and they provide routes and alternative routes between the thousands of individual exchanges.

For many years prior to the Communications Act of 1934 and continuing to the present, the individual states pervasively regulated intrastate and local exchange telephone service. This jurisdiction has extended to the rates, regulations, and conditions on which such service is offered and to the facilities predominantly used in providing the service such as the ordinary telephone itself. Under state law, telephone company ("carrier") service offerings are made through tariffs filed with the state regulatory agency and such agencies have power to review tariffs and to require the modification of rates, regulations, conditions and the provision of facilities under familiar statutory standards.[6]

This state regulatory jurisdiction has embraced the provision of telephones and other terminal equipment virtually from the outset of regulated service in this country. *E.g., Gardner* v. *Providence Bell Co.*, 49 A. 1004 (R.I. 1901). The terminal equipment is connected directly into the local exchange switching equipment through local lines, and terminal equipment is part of the local exchange plant; in fact, well over 95 percent of the calls for which the telephone is used are intrastate or local exchange calls.[7] Consequently, telephones

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[6] The Virginia statute is illustrative and pertinent provisions appear at Pet. App. 1e. Other illustrative statutes are Maryland Code Ann., Art. 78; N.Y. Pub. Serv. Law; Minn. Stat. Ann. § 237.01, *et seq.*; Iowa Code Ann. § 490A.1, *et seq.*; N.C. Gen. Stat. § 62-1, *et seq.*

[7] At the time the Communications Act was passed the figure was

and other terminal equipment are ordinarily provided pursuant to the tariffs filed with the *state* regulatory agencies. See p. 21, below.

Accordingly, when the Communications Act was passed in 1934, there existed comprehensive state regulation of telephone companies, but there remained certain aspects of telecommunications—*e.g.,* rates for interstate calls—that the states did not or could not effectively control. In the Act, Congress sought to assure adequate federal regulation over these specified interstate matters, but also to preserve existing state jurisdiction against federal invasion. Thus, Sections 2(b)(1) and 221(b) provide that, apart from radio licensing, "nothing in this Act" shall "apply or give the Commission jurisdiction with respect to facilities . . . for or in connection with intrastate communications service" (Section 2(b)(1)) or "with respect to facilities . . . for or in connection with . . . telephone exchange service . . . even though a portion of such exchange service constitutes interstate or foreign communications" (Section 221(b)).[8]

The FCC's specific statutory powers complement, rather than supersede, existing state regulatory au-

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estimated at "97½ or 98 percent" of all telephone calls (78 Cong. Rec. 10316 (1934)). Most recently the figure has been estimated at approximately 97 percent. Pet. App. 14b.

[8] 47 U.S.C. §§ 152(b)(1), 221(b). Both Sections 2(b) and 221(b) preserve the FCC's power to license radio frequencies under Section 301, 47 U.S.C. § 301. This qualification is merely to assure that carriers, like any other users of the limited number of radio frequencies available, do not use frequencies allocated to others. See, *e.g.,* H.R. Rep. No. 910, 83d Cong., 1st Sess. 1 (1953). Section 221(b) also requires, as a condition of the exemption, that state regulation exist; and such regulation does exist in every state.

thority. For example, the FCC is granted express authority over the rates for "interstate" calls which must be set forth in tariffs filed with the FCC (Sections 201-05, 47 U.S.C. §§ 201-05); and carriers proposing to construct or operate new "interstate" lines must obtain prior approval from the FCC. Section 214, 47 U.S.C. § 214. However, the statute does not purport to grant the FCC power over terminal equipment connected with local telephone exchanges and predominantly used for intrastate and exchange calls. Nor is the FCC's permission required for construction of intrastate or local exchange facilities.

The legislative history of the Act confirms that Sections 2(b)(1) and 221(b) represented a deliberate Congressional intent to preserve existing state regulation. As the Senate Manager of the statute explained:

> "[A]t the request of the State commission representatives, we wrote in certain provisions that are not in the Interstate Commerce Act, to protect the State commissions against being overridden by this Commission [the FCC], as the Interstate Commerce Commission has overridden some of the State railroad Commissions."[9]

Congress therefore reserved to the States "exclusive" jurisdiction over intrastate service (S. Rep. No. 781, 73d Cong., 2d Sess. 3 (1934)) to assure that the legislation "does not affect" the 97½ or 98 percent of telephone communications that were and are intrastate. 78 Cong. Rec. 10316 (1934).

For over 40 years and until the present case, the FCC respected the jurisdictional limitations imposed by

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[9] *Hearings on S. 2910 Before the Senate Committee on Interstate Commerce*, 73d Cong., 2d Sess. 179 (1934) (Senator Dill). The legislative history is discussed at greater length at pp. 28-30, below.

Congress. Ordinary terminal equipment has been provided under state tariffs and the FCC has never claimed general authority over such equipment even though a very small fraction of the time it may be for interstate calls.[10] AT&T's FCC Tariff No. 263, which offers ordinary long-distance interstate telephone service and is concurred in by many other carriers, does not even purport to offer telephones or other terminal equipment, but provides (para. 1.1) that the station equipment is "furnished in accordance with the Telephone Exchange Service Tariffs," *i.e.*, the tariffs filed with the state regulatory agencies by the local telephone companies.

B. The FCC's New Regulatory Policies and the Proceedings Below

In establishing FCC regulation, Congress not only restricted the FCC's jurisdiction to prevent federal interference with state regulation but also enacted public interest standards to be applied by the FCC within its area of competence. Under the Congressional plan the FCC in regulating interstate service may not "[m]erely . . . assume that competition is bound to be of advantage, in an industry so regulated and so largely

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[10] Only in comparatively rare situations, involving a tiny percentage of terminal equipment, is terminal equipment tariffed with the FCC under Sections 201-05 rather than with the state agencies. An example is certain military facilities which are used in conjunction with the interstate defense network and certain teletypewriter equipment that is not part of telephone exchange service and is predominantly interstate in usage. *E.g., United States Department of Defense* v. *General Telephone Co.*, 38 F.C.C.2d 803 (1973), *review denied*, FCC 73-854 (1973), *aff'd per curiam sub nom. St. Joseph Tel. & Tel. Co.* v. *FCC*, 505 F.2d 476 (D.C. Cir. 1974); *AT&T-TWX*, 38 F.C.C. 1127 (1965).

closed as is this one . . . ."[11] This present case involves only delineation of the FCC's jurisdiction—not the validity of the policies it seeks to implement. Nevertheless, the present controversy finds its roots in new FCC regulatory policies which require brief description.

In the 1960s, the FCC began to substitute for the "regulated monopoly" concept of telephone service long followed by it and by the state agencies a new approach of "restricted competition." It first permitted certain businesses to construct their own interstate "private line" telephone facilities and later authorized the entry of numerous new common carriers (called specialized carriers) to provide interstate "private line" service in competition with the telephone companies. Similarly, in the so-called *Carterfone* case, the FCC held invalid interstate tariff provisions as applied to prohibit customer use of a device interconnecting two communications systems for "interstate or foreign telephone service."[12]

However, in *Carterfone,* the FCC made clear that it was not requiring substitution of customer-provided telephones or other such terminal equipment to replace telephone company facilities; and it did not purport to interfere with the state tariffs or state regulatory authority.[13] Various telephone companies themselves

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[11] *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 94-97 (1953). *Accord, Hawaiian Telephone Co.* v. *FCC,* 498 F.2d 771 (D.C. Cir. 1974).

[12] *Carterfone,* 13 F.C.C.2d 420, 441, *reconsideration denied,* 14 F.C.C.2d 71 (1968). The device in question was not a telephone or similar piece of terminal equipment; it was a means of connecting a private radio communications system to the telephone system. *Id.*

[13] See *AT&T "Foreign Attachments" Tariff Revisions,* 15 F.C.C. 2d 605, 609-10 (1968), *reconsideration denied,* 18 F.C.C.2d 871

chose to provide substantially greater opportunity for the use of customer-supplied terminal equipment under intrastate and exchange tariffs. For example, new tariffs filed by the Bell System with the states generally permitted customers to connect electrically their own terminal equipment to local telephone exchanges through "protective connecting arrangements" safeguarding telephone company facilities and employees against improper transmissions of signals or excessive voltages.[14]

Although the state agencies permitted the new tariffs to become effective, many states became increasingly concerned about the adverse economic impact of expanded customer substitution of terminal equipment. For example, the National Association of Regulatory Utility Commissioners ("NARUC") recently concluded that widespread substitution of customer-provided equipment would increase telephone rates for ordinary local residential and business telephone users by $360-740 million annually by 1980 and almost $1 billion annually by 1984.[15] The North Carolina Utilities

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(1969): "Our decision in *Carterfone* does not hold that a customer may substitute his own equipment or facilities . . . for that furnished by the telephone company . . . ." *Id.*

[14] In general, the state tariffs prohibit the use of customer-supplied telephones and other terminal equipment except where specified conditions are met such as the use of protective connecting arrangements; they describe the conditions under which customer-supplied equipment can be utilized; and they offer the protective connecting arrangements at rates and under regulations described in the state tariffs. As noted, terminal equipment is offered pursuant to FCC tariffs in a very limited number of instances (see p. 9, above) and corresponding provisions are included in the federal tariffs.

[15] NARUC is the national organization of state commissioners responsible for utility regulation in the states. The state agencies'

Commission instituted an investigation to consider limiting connection of customer-provided terminal equipment for use in intrastate communication. Pet. App. 2b. Other states have made clear their desire to enforce existing state regulations requiring approval of or involving limitations on customer substitution of terminal equipment.

In September 1973, the FCC instituted the present proceeding to decide whether its actions "preempted" state regulation of terminal equipment connection. *Telerent Leasing Corp.*, FCC 73-901, Sept. 7, 1973, para. 1. The proceeding was prompted by a petition for ruling filed by equipment manufacturers and sellers who alleged that the North Carolina investigation would chill customers' desire to substitute their own equipment. *Id.* paras. 6-7.[16] However, the FCC had also been contemplating extension of its new "restricted competition" policy in the terminal equipment field, and *Telerent* provided an opportunity for it to assert broadly its own jurisdictional authority *vis-a-vis* that of the state agencies.[17]

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basic concern is that customer-substitution may permit certain customers, particularly large companies, to obtain lower rates by using their own equipment, but this in turn will require that ordinary business and residential users make up revenue losses suffered by the telephone companies through such substitution. See NARUC, *Report After Investigation*, May 1974.

[16] The FCC also ultimately considered rulings of the Nebraska Attorney General and the Oklahoma Corporation Commission affirming state requirements for certificates of public convenience and necessity in certain instances where customer supplied terminal equipment was utilized. Pet. App. 37b-38b.

[17] Following issuance of its *Telerent* decision, the FCC did in fact seek to extend its substantive policies to regulate pervasively the provision of terminal equipment. See pp. 18-19, below.

In February 1974, the FCC issued its Memorandum Opinion and Order in *Telerent*. 45 F.C.C.2d 204 (Pet. App. 1b). Over the objections of NARUC and numerous state commissions,[18] the FCC declared that its authority over "all interstate and foreign communication" permitted it to regulate connection of terminal equipment to local exchanges,[19] even though such terminal equipment has long been regulated by the state agencies, is used predominantly for intrastate and exchange communication and is generally provided under state tariffs as a part of intrastate and exchange service. While both Sections 2(b) and 221(b) specifically preclude FCC jurisdiction over "facilities used for or in connection with" intrastate or exchange service, the FCC asserted that these provisions were "primarily concerned with the protection of traditional State jurisdiction over intrastate rates and services . . . ." Pet. App. 29b.

The Court of Appeals for the Fourth Circuit affirmed the FCC's decision by a 2-to-1 vote. Pet. App. 1a. The majority opinion concluded that FCC authority to regulate terminal equipment was not clearly permitted or forbidden by the basic jurisdictional provisions of the

[18] Among the state agencies opposing the FCC's decision were the Missouri Public Service Commission, the Public Utilities Commission of Ohio, the Maryland Public Service Commission, the North Carolina Utilities Commission, the Michigan Public Service Commission, the Oregon Public Utility Commissioner, the Washington Utilities and Transportation Commission, Public Service Commission of Wyoming, the Alabama Public Service Commission and the Tennessee Public Service Commission.

[19] Pet. App. 22b. The FCC does not in fact possess jurisdiction even over all "interstate" communications because of specific exclusions in the Act. See, *e.g.*, Sections 2(b)(2), 3(e) (final proviso), and 221(b), 47 U.S.C. §§ 152(b)(2), 153(e) and 221(b).

Act,[20] so it relied on inferences from subordinate provisions and events. These included reliance on a qualifying provision in Section 2(b) (Pet. App. 10a-11a)—which is by its own terms plainly inapplicable to Section 2(b)(1)—and a mistaken understanding of both the legislative history of the Act and the long-continued state regulation of terminal equipment before and since its passage (Pet. App. 15a-16a). See pp. 25-36, below.

On petitions for rehearing, these and other crucial errors in the majority opinion were called to the Court's attention. However, in the absence of the author of the majority opinion, the petitions for rehearing were denied by a 1-to-1 vote. Pet. App. 1d.[21] Rehearing *en banc* was also denied on the stated ground that all other judges in active service in the Fourth Circuit were disqualified from sitting on the case. Pet. App. 1d.

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[20] The majority opinion apparently believed that regulation of terminal equipment fell both within the Act's language granting the FCC authority to regulate interstate communication (Sections 1 and 2(a)) and within the language of Section 2(b)(1) forbidding regulation of intrastate communication. Pet. App. 10a. The majority opinion failed to deal directly with the argument of the parties opposing FCC jurisdiction that, even assuming terminal equipment might otherwise be regulated under Sections 1 and 2(a), Sections 2(b)(1) and 221(b) constituted explicit exceptions overriding any otherwise applicable grant of FCC authority contained in other sections of the Act.

[21] Because of the disqualification of other Fourth Circuit judges, the panel consisted of Judge Widener from the Fourth Circuit and Judges Hastie and Tuttle from the Third and Fifth Circuits. Judge Hastie, the author of the majority opinion, subsequently passed away. Judge Widener wrote the dissenting opinion.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted in this case for two basic reasons. First, the nature of the jurisdictional issue in this case, its vastly important and far-reaching ramifications for the way telephone communications service will be provided in this country in the future, the extension of federal authority into an area long regulated by state agencies, and the need for a definitive decision on a matter of continuing importance all strongly and urgently support review by this Court. Thus, the case presents one of the single most important jurisdictional questions under the Communications Act ever to come before this Court, outweighing even the major jurisdictional issue considered by this Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968).

Second, the majority opinion has manifestly misconstrued the statutory plan and has ignored the plain language of Sections 2(b)(1) and 221(b) respected by the FCC for many years until its extraordinary about-face in the present case. See, *e.g.*, *Kitchen* v. *FCC*, 464 F.2d 801 (D.C. Cir. 1972). The opinion disregards canons of construction repeatedly affirmed by this Court and reaches a result which is directly contrary to Congress' repeatedly expressed intent to preserve existing state jurisdiction. The decision also ignores this Court's warning that long-standing state regulation may not be displaced without the clearest evidence of Congressional purpose.

I. Certiorari Should Be Granted Because of the Nature and Importance of the Jurisdictional Issue, Its Continuing Practical Impact in the Administration of the Act, and the Urgency of a Definitive Resolution.

The FCC has in this case unequivocally determined that it can regulate broadly the connection of terminal equipment to local telephone exchanges and can override state regulation of the same subject matter except so far as the states adhere to the FCC's preferred policies. The majority opinion of the court below has sustained the FCC's construction over a vigorous dissent. By virtually every test applied by this Court in past cases accepted for review, the present case presents a profound legal issue of continuing importance meriting plenary consideration on certiorari.

1. The central legal issue posed is whether the FCC's assertion of preemptive jurisdiction is forbidden by Sections 2(b)(1) and 221(b) of the Communications Act. The issue is infinitely more basic and more far-reaching than the conventional preemption question whether a *particular* valid federal statute or agency regulation conflicts with and preempts a *particular* state statute or regulation. This case instead involves the threshold question of whether—under the statutory division of authority between the FCC and the states established by the Communications Act—the FCC has statutory jurisdiction to engage in valid preemptive regulation in the terminal equipment field.[22]

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[22] This is entirely a matter of federal statutory construction. The issue is not whether Congress *could* constitutionally have granted the FCC the power the agency seeks to exercise; the question is whether it *did* grant that power or whether it expressly and deliberately withheld this authority from the FCC under Sections 2(b) and 221(b) and reserved the authority to the states which have long exercised it.

The crucial statutory provisions are the keystone in the legislative structure established by Congress to divide regulatory power over telecommunications by common carrier between federal and state authorities. Sections 1 and 2(a) delineate the general scope of FCC authority, subject to major exceptions; Sections 2(b) and 221(b) qualify and confine that authority in unequivocal terms for deliberately conceived legislative reasons. The issue thus presented is profoundly a jurisdictional issue, and the construction of such statutory limitations is a matter on which Congress has given the courts—not the federal agency—"the final say." *Yonkers* v. *United States,* 320 U.S. 685, 689 (1944).

This case therefore presents precisely the type of "important question of regulatory authority" which this Court normally entertains. *United States* v. *Southwestern Cable Co.,* 392 U.S. 157 (1968). In *Southwestern Cable,* a case whose practical importance is dwarfed by the present controversy, this Court resolved the FCC's jurisdiction to regulate CATV systems. In *Regents* v. *Carroll,* 338 U.S. 586 (1950), the Court reviewed the scope of FCC authority over nonlicensees. In a host of cases involving other federal agencies, this Court has recognized its responsibility to delineate the jurisdictional boundaries fixed for federal agencies by regulatory statutes including the Federal Power Act,[23] the Natural Gas Act,[24] and the Interstate Commerce Act.[25]

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[23] *FPC* v. *Conway Corp.,* 44 U.S.L.Wk. 4777 (June 7, 1976); *Chemehuevi Tribe of Indians* v. *FPC,* 420 U.S. 395 (1975).

[24] *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954); *FPC* v. *Transcontinental Pipe Line Corp.,* 365 U.S. 1 (1961); *California* v. *FPC,* 369 U.S. 482 (1962).

[25] *North Carolina* v. *United States,* 325 U.S. 507 (1945); *Florida* v. *United States,* 282 U.S. 194 (1931).

The majority opinion below did not suggest that the basic issue of FCC subject matter jurisdiction here presented was directly controlled by any prior decision of this Court. Indeed, the opinion cited not a single decision of this Court. Accordingly, in the language of this Court's rules, the case presents "an important question of federal law which has not been, but should be, settled by this court." S. Ct. R. 19(1)(b).[26]

2. A related reason for review here is the immense practical impact of the FCC's claim of jurisdiction. The immediate outcome of the decision is to declare invalid existing or anticipated actions in several individual states,[27] but the basic jurisdictional holding is a foundation for virtually any federal regulatory action respecting terminal equipment connection the FCC might wish to impose. In substance the FCC has asserted jurisdiction to regulate directly and pervasively connection of the over 100 million telephones and other pieces of terminal equipment in the United States, whether supplied by carriers or by customers.

Removing any doubt about the scope of its claim, the FCC has followed *Telerent* by recently promulgating, without further discussion of its jurisdictional author-

[26] So far as decisions of this Court do illuminate the issue, they strongly counsel canons of statutory construction and presumptions of Congressional intent contrary to the approach and result adopted below in this case. See pp. 25, 34-36, below.

[27] After asserting its jurisdictional claim, the FCC examined a proposed rule being considered by the North Carolina Utilities Commission and held that, if adopted, it would be invalid. Pet. App. 37b. It held an existing rule of the Oklahoma Corporation Commission invalid in two different respects. *Id.* 39b-40b. Finally, it held in substance that an advisory ruling by the Attorney General of Nebraska is invalid (*id.*), although that ruling was ultimately overturned in state court.

ity, sweeping new regulations establishing a "registration program" for all terminal equipment connected to local exchanges in the United States.[28] This "registration program" purports to regulate almost every aspect of the connection of terminal equipment including the establishment of technical standards, procedures for connection, and regulation of both carrier-supplied and customer-supplied equipment. See Pet. App. 1f. The regulations would extend the FCC's jurisdiction to carrier-provided terminal equipment that has been supplied pursuant to state tariffs and without federal regulation for over 50 years and would contradict and supersede tariffs in practically every state.

Nor does the FCC regard the scope of *Telerent* as limited to terminal equipment. It has recently invoked *Telerent* in a decision declaring in substance that California and Oklahoma must permit specialized carriers to provide particular *intrastate* telephone services, contrary to orders of the state regulatory commissions, where the FCC has authorized the carriers to provide interstate services.[29] Relying directly on *Telerent,* the FCC rejected the proposition that regulation of intrastate service was reserved expressly to the state agencies by Section 2(b)(1). 56 F.C.C.2d at 20. Yet, Sections

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[28] The regulations, which comprise an entirely new part of the FCC's rules (Part 68), were first promulgated in 1975 and are reprinted for illustrative purposes as Appendix F to this petition. The validity of the substantive rules themselves is now the subject of new litigation in the Fourth Circuit, which has stayed their operation in most respects. The regulations are reprinted here simply to confirm that the broad jurisdictional claims asserted in *Telerent* underlie broad and continuing regulatory action going even beyond the particular state actions invalidated in *Telerent*.

[29] *AT&T,* 56 F.C.C.2d 14 (1975), *pet. for review pending sub nom. California* v. *FCC,* D.C. Cir., No. 75-2060 and consolidated cases.

2(b)(1) and 221(b) bar FCC regulation of intrastate and exchange "service" and "rates" in precisely the same paragraphs and the same terms as they bar FCC regulation of "facilities" used for or in connection with intrastate and exchange service.[30]

The state orders invalidated in *Telerent*, the FCC "registration program," and the intrastate services case are merely examples of the reach of the FCC's basic jurisdictional claim in *Telerent*. That claim can as readily be extended to impose effective federal control over intrastate and exchange rates, because the regulation of intrastate rates, of local service, and of terminal facilities are inextricably intertwined.[31] Even if *Telerent* were limited solely to terminal equipment, the jurisdictional claim—embracing as it does authority over 100 million telephones and other pieces of terminal equipment—fully warrants review by this Court.

3. Yet another reason for certiorari is that the FCC's intrusion on pre-existing state authority raises a delicate issue of federal-state relations that is especially appropriate for this Court's resolution. The Communications Act, like the Natural Gas Act earlier

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[30] Sections 2(b)(1) and 221(b) provide that, apart from Section 301, "nothing in this Act" empowers the FCC to regulate "charges, classifications, practices, facilities, or regulations" for or in connection with "intrastate" or "exchange" service.

[31] *Western Union Tel. Co.* v. *Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921). Dissenting below, Judge Widener observed: "Today we allow the FCC to regulate only a facility mentioned in the statute as reserved for State regulation. . . . No reason would then exist for the FCC not to regulate 'charges, classifications, practices [and] services,' other matters specifically reserved for State regulation by the same statute . . . ." Pet. App. 25a.

construed by this Court, was drawn with "meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Panhandle Eastern Pipe Line Co.* v. *Comm'n,* 332 U.S. 507, 517-18 (1947). This Court has repeatedly shown its concern and its willingness to grant review where federal power is invoked to override authority long claimed and exercised by the individual states.[32]

This imperative for Supreme Court review applies with special force where, as here, the federal agency action would invade a field long subject to pervasive regulation by the states. See pp. 6-9, above. As against occasional or limited FCC actions now alleged to provide a precedent for *Telerent* (see p. 31, below), it is indisputable that the states have regulated in plenary fashion and for many decades virtually all aspects of terminal equipment including customer-equipment connection.[33] *Telerent* itself purports to de-

[32] *E.g., Head* v. *New Mexico Board,* 374 U.S. 424 (1963); *Yonkers* v. *United States,* 320 U.S. 685 (1944); *Florida Lime & Avocado Growers* v. *Paul,* 373 U.S. 132 (1963); *FTC* v. *Bunte Bros.,* 312 U.S. 349 (1941); *Maurer* v. *Hamilton,* 309 U.S. 598 (1940); *Rice* v. *Board of Trade,* 331 U.S. 247 (1947).

[33] See, *e.g., City of Los Angeles* v. *Southern California Tel. Co.,* 2 P.U.R. (n.s.) 247 (Cal. R.R. Comm'n 1933) (interconnection of private telephone system to telephone network); *Quick Action Collection Co.* v. *New York Tel. Co.,* P.U.R. 1920D 137 (N.J. Bd. Pub. Util. Comm'rs 1920) (connection of privately owned equipment to carrier terminal equipment); *Jacobsen* v. *Northwestern Bell Tel. Co.,* 61 P.U.R.3d 541 (S.D. Pub. Util. Comm'n 1965) (connection of privately owned switching device to carrier line); *Peters Sunset Beach, Inc.* v. *Northwestern Bell Tel. Co.,* 60 P.U.R.3d 363 (Minn. R.R. & Whse. Comm'n 1964), *aff'd,* Minn. Dist. Ct. 8th Jud. Dist., Case No. 8529 (Aug. 17, 1966) (interconnection of private telephone system to telephone network); *Racine Flash Cab Co.* v. *Wisconsin Tel. Co.,* 65 P.U.R.3d 321 (Wis. Pub. Serv. Comm'n 1966) (interconnection of privately owned, automatic cab dispatch-

clare invalid existing and anticipated state actions, and it has since been drastically applied in the FCC's "registration program" to override tariffs filed with virtually all of the individual states.

Moreover, the telephone companies themselves are placed in an intolerable position by the FCC's attempt to supersede the plenary regulation long exercised by the states over terminal equipment. The FCC's preemption of jurisdiction over local exchange facilities cannot be divorced from state regulation of rates and services. State regulation of facilities, including terminal equipment, interrelates directly with state regulation of the rates for terminal equipment and all other services covered by state tariffs. It is manifestly unfair to subject the telephone companies to divided regulation of the very same local exchange terminal equipment. Congress recognized this interdependence in reserving jurisdiction to the states in Sections 2(b)(1) and 221(b). Under the FCC's interpretation of the Act, the term "facilities" is simply torn out of the statutory phrase, contrary to the economic realities recognized by Congress in placing jurisdiction

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ing unit). See also, *e.g., Gardner* v. *Providence Tel. Co.,* 49 A. 1004 (R.I.), *rehearing denied,* 50 A. 1014 (1901); *In re Telephone Companies,* P.U.R. 1915A 1032, 1046 (S.D. Bd. R.R. Comm'rs 1915); *Littlepage* v. *Mosier Valley Tel. Co.,* P.U.R. 1918E 425 (Ore. Pub. Serv. Comm'n 1918); *Re Farmers Fountain Tel. Co.,* P.U.R. 1926C 363 (Ill. Comm. Comm'n 1926); *Re Customers of the Concordia Tel. Co.,* 3 P.U.R. (n.s.) 522, 525 (Mo. Pub. Serv. Comm'n 1934); *King* v. *Pacific Tel. & Tel. Co.,* 16 P.U.R. (n.s.) 348 (Ore. Pub. Util. Comm'r 1936); *Electronic Detectors, Inc.* v. *New Jersey Bell Tel. Co.,* 62 P.U.R. 3d 186 (N.J. Bd. Pub. Util. Comm'rs 1965); *Western States Tel. Co.* v. *Pacific Tel. & Tel. Co.,* 64 P.U.R. 3d 527 (Cal. Pub. Util. Comm'n 1966); *Netsky* v. *Bell Tel. Co. of Pa.,* 65 P.U.R.3d 145 (Pa. Pub. Util. Comm'n 1966).

over "charges . . . services [and] facilities" in the same jurisdiction.

In addition, if the telephone companies fail to comply with FCC orders respecting terminal equipment, the FCC can seek sanctions and attempt to enforce compliance; and the states can seek to apply similar penalties through the state courts so far as the FCC-ordered actions are inconsistent with the existing state tariffs and state policy. Unless and until this Court resolves the issue in definitive terms, the potential for conflict between the FCC and state agencies will remain a continuing irritant to federal-state relations and will involve the real threat of conflicting and inconsistent regulation for the telephone companies.[34]

The FCC's *Telerent* decision itself asserts that the jurisdictional question requires immediate resolution. Pet. App. 34b. The reasons it gave, involving the uncertainty created for equipment manufacturers by orders contemplated or entered in three states, have been strongly reinforced by subsequent developments. The "registration program," now being litigated in the Fourth Circuit, the FCC's action on California and Oklahoma intrastate services, now at issue in the District of Columbia Circuit, and other regulatory measures which will inevitably follow,[35] make it vital

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[34] There is no indication that all of the states will permit the telephone companies to alter their tariffs to comply with the "registration program" or that state rules or orders such as those involved in *Telerent* will not be enforced.

[35] For example, in July 1976, the FCC published extensive new regulations establishing technical specifications for jacks and plugs which it requires be used for almost all future connections of tele-

to settle the FCC's jurisdictional authority at the earliest possible time.

4. This is, finally, an especially appropriate case for resolution of the jurisdictional issue. It raises the basic legal issue in a broad context where it has been squarely addressed by the FCC, the parties, and the majority and dissenting opinions below; and the legal issue is not skewed or distorted by dispute about the merits or wisdom of particular policies. This Court in *Southwestern Cable* adopted this very approach by resolving the FCC's jurisdiction over CATV at the outset and reserving for future decision questions of the merits of particular FCC regulations.[36]

II. The Decision Below Fundamentally Misconstrues the Communications Act's Reservation of State Jurisdiction and Disregards Longstanding Rules of Statutory Construction Established by This Court.

Certiorari is further justified in this case because of the basic legal errors in the majority opinion. The decision below sustaining the FCC's claim of jurisdiction is literally irreconcilable with the plain language of the Communications Act; it disregards settled canons of construction established by this Court;

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phones and other terminal equipment to local telephone lines. 41 Fed. Reg. 28694-782 (July 12, 1976).

[36] A full range of interested parties was represented below. These include telephone companies, manufacturers of terminal equipment, specialized carriers, user interests, the national association representing independent telephone companies, and the national organization representing state regulatory commissions, in addition to individual state agencies. The range of interests assures that all of the implications of the FCC's jurisdictional claims and all of the arguments fairly to be made for and against it will be available to the Court deciding this central issue.

it also disregards the unmistakable thrust of the legislative history and administrative practice for over four decades since the passage of the Act; and it fails to heed this Court's warning that longstanding state regulation is not to be displaced without the clearest evidence that Congress intended such displacement.

1. As this Court has repeatedly said, "it is elementary that the meaning of the statute must, in the first instance, be sought in the language in which the act is framed . . . ." *Caminetti* v. *United States,* 242 U.S. 470, 485 (1917).[37] The FCC's decision in *Telerent* is directly inconsistent with the plain language of the Act's provisions:

> Section 2(b)(1). "Subject to the provisions of section 301 [regarding the licensing of radio frequency uses], ***nothing in this Act*** shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, ***facilities,*** or regulations ***for or in connection with intrastate communication service*** . . ." (emphasis added).

> Section 221(b). "Subject to the provisions of section 301, ***nothing in this Act*** shall be construed to apply, or to give the Commission jurisisdiction, with respect to charges, classifications, practices, services, ***facilities,*** or regulations ***for or in connection with*** . . . telephone exchange service . . . ***even though a portion of such exchange service constitutes interstate or foreign communication*** . . . (emphasis added).

[37] See also, *e.g., Flora* v. *United States,* 357 U.S. 63, 65 (1958); *United States* v. *Missouri P. R.R.,* 278 U.S. 269, 278 (1929).

The language of these sections controls the present case virtually phrase by phrase. The FCC is unquestionably seeking to "apply" the Act and to assert "jurisdiction" over terminal equipment and its connection to local exchanges, as the invalidation of state actions and the "registration program" plainly demonstrate. The reserved FCC jurisdiction under Section 301 has no application to ordinary terminal equipment.[38] Thus, the statutory prohibitions directly apply since it is clear that telephones and other pieces of terminal equipment are "facilities" used "for and in connection with" intrastate and exchange services.

In *Telerent* itself, the FCC admitted that the ordinary "station" set or telephone is part of "exchange plant" (Pet. App. 21b) and it has said the same thing on other occasions. See, *e.g.*, p. 32, below. Practically all terminal equipment is connected directly into the local exchange switching equipment, functions as an integral part of the exchange, and is used predominantly for intrastate and exchange communications. See pp. 5-7, above. Almost all such equipment is offered under state tariffs as part of intrastate and local exchange service.

The majority opinion, recognizing that Sections 2(b)(1) and 221(b) literally embraced terminal equipment, nevertheless believed that the capability of

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[38] Only a fraction of one percent of terminal equipment is represented by "mobile" radio-telephones which are generally installed in vehicles. While the user must obtain a license from the FCC under Section 301, generally the Section 301 power was not designed to go beyond radio licensing (see, *e.g.*, H.R. Rep. No. 910, 83rd Cong., 1st Sess. 1 (1953)), and the mobile telephones are normally offered under state tariffs. In any event Section 301 has no application to ordinary telephones and other terminal equipment, which do not require radio licensing.

practically all terminal equipment for interstate communication—albeit a small fraction of the time in most cases—also brought such equipment within the FCC's jurisdiction to regulate interstate communication.[39] However, even assuming that ordinary terminal equipment might *otherwise* be within the scope of the FCC's authority under Sections 1 and 2(a), any such power is specifically withdrawn and negated by the language of Sections 2(b) and 221(b). By their precise terms—"nothing in this Act"—these provisions override and preclude the exercise of FCC authority over "facilities" within Sections 2(b)(1) and 221(b).

The fact that Congress specifically excepted the FCC's jurisdiction under Section 301 from the otherwise preclusive language of Sections 2(b)(1) and 221(b) confirms the overriding effect of these sections upon the grants of authority generally made in the Act. The inference is compelling that Congress fully appreciated that, without a specific reservation of the FCC's power under Section 301, the FCC's radio licensing power like any other general grant of authority in the Act would have been rendered inapplicable to facilities embraced by Sections 2(b)(1) and 221(b). If the majority opinion's analysis were cor-

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[39] Although Sections 1 and 2(a) of the Act do refer to the FCC's jurisdiction over interstate communication, nothing in these sections even refers to "facilities." The reference to "facilities" relied on by the majority opinion appears in a separate definitional section (Section 3(a)) and is hardly an expression of Congressional intent to convey jurisdiction over terminal equipment. Compare Section 214, establishing FCC authority over interstate lines in unmistakable terms.

rect, the Section 301 reservation would have been wholly pointless.[40]

This preclusive effect of the reservation of state jurisdiction is confirmed by *Kitchen* v. *FCC,* 464 F.2d 801 (D.C. Cir. 1972), a decision ignored by the majority opinion and inconsistent with its reasoning. There the issue presented was whether the FCC had jurisdiction over a telephone exchange building based on the assertion that a portion of traffic switched through the facility was interstate and the facility was thus part of an interstate "line" under Section 214. Citing the language of Section 221(b) and its legislative history, the D.C. Circuit unanimously declared that "[e]ven if such buildings could be considered part of a 'line' within the meaning of Section 214(a), an exercise of jurisdiction would still be precluded by Section 221(b)." *Id.* at 803 (footnotes omitted).

2. The majority opinion's frustration of Congressional intent is a further forceful argument for certiorari. This disregard of the plain terms of the statute cannot be rescued by the resort to legislative history or

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[40] The majority opinion also relied on two other provisions of the Act, both of which are inapplicable on their face. It first emphasized (Pet. App. 10a) the concluding proviso of Section 2(b) which reserves the FCC's Section 201-05 powers for carriers "described in clauses (2), (3), and (4)"; but the majority opinion failed to note that this reservation is *not* made with respect to clause (1) of Section 2(b) or with respect to Section 221(b), which are the controlling provisions here. It later referred (Pet. App. 15a) to Section 410(c) as confirming federal preeminence in matters of interest to the states; but as the language and legislative history of Section 410(c) make clear, that preeminence is confined to matters otherwise within the FCC's jurisdiction (see, *e.g.*, Section 410(c); S. Rep. No. 92-362, 92d Cong., 1st Sess. (1971)), which under Sections 2(b)(1) and 221(b) is not true of terminal equipment.

administrative practice as limiting the broad and unqualified language of Sections 2(b) and 221(b). What the legislative history actually shows is that the states rightly anticipated the FCC's eventual reach for preemptive power and that Congress responded to these concerns in Sections 2(b) and 221(b) by deliberately seeking to preclude FCC preemption.

As the Communications Act was initially proposed, the FCC would have had potential authority to intrude into areas that were the subject of active state regulation. Certain language in the original bills affected intrastate service, and the so-called *Shreveport* doctrine, allowing the ICC to regulate intrastate service to protect interstate commerce, foreshadowed similar expansion of FCC jurisdiction.[41] Thirty-seven states and their national association, which is the predecessor of NARUC, adopted resolutions opposing the original bill and vehemently opposed any legislation that might empower the FCC to supersede existing state jurisdiction in the communications field. *Hearings on S. 6 before the Senate Committee on Interstate Commerce,* 71st Cong., 1st Sess. 2167-68 (1930).

As the Senate Manager of the Communications Act explained in language already quoted in full (p. 8, above), the bills were revised to include "certain provisions" designed "to protect the State Commissions from being overridden by this Commission [the FCC] . . . ." The national association, satisfied that the bill had been now drawn to "safeguard State power to regulate," withdrew its opposition. *Hearings on H.R. 8301, Before the House Committee on Interstate and*

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[41] See *Houston, E. & W.T. Ry.* v. *United States,* 234 U.S. 342 (1912) (the *Shreveport* case); S. 6, § 35(c)-(d), 71st Cong., 1st Sess. 43-44 (1929), introduced 71 Cong. Rec. 102.

Foreign Commerce, 73rd Cong., 2d Sess. 136 (1934). The Senate report explicitly confirmed that the jurisdiction reserved to the states was to be "exclusive." S. Rep. No. 781, 73rd Cong., 2d Sess. 3 (1934).

The majority opinion brushed aside this legislative history, asserting that Congress was principally concerned with preserving existing state authority over "local telephone rates and charges." Pet. App. 13a, n.6. This provides no explanation, however, for Congress' inclusion of "facilities" in Sections 2(b) and 221(b), because both sections already contain the word "charges." Indeed, the majority opinion's construction would render the term "facilities" practically meaningless since, as the FCC has itself stressed (Pet. App. 21b), few pieces of terminal equipment can be used only for interstate or intrastate service. Thus, the construction below is also inconsistent with the obligation of courts to assure that "all of the words used in a legislative act are to be given force and meaning." [42]

After the passage of the Communications Act, the states continued their pervasive regulation of terminal equipment. Tariffs filed with the states govern the rates, regulations and conditions applicable to provision of terminal equipment including conditions for use of customer provided equipment. See pp. 6-9, above. Only in quite limited instances involving peculiar interstate relationships (such as interstate defense facilities) have particular pieces of terminal equipment been tariffed with the FCC, and its present jurisdictional claims are in no sense directed or limited to such a minute portion of terminal equipment.

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[42] *United States* v. *Standard Brewery Co.*, 251 U.S. 210, 218 (1921). See also, *e.g., United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955).

In the face of this long continuing history of state regulation of terminal equipment, both before the Act and in the subsequent decades, the FCC's claim that there is a substantial history of FCC regulation of terminal equipment is frivolous. The FCC's claim, mistakenly accepted by the majority opinion (Pet. App. 15a-16a), rests on a scattering of clearly distinguishable cases[43] overshadowed by the FCC's own prior precedents to the contrary and the literally thousands of state tariffs and regulatory proceedings applicable to terminal equipment.[44]

Until the *Telerent* decision the FCC has never regarded the Act or its scattering of precedents (p. 31, n.43, above) as supporting any general jurisdiction over the telephone or similar pieces of terminal equipment. Indeed, as recently as 1973, the Chairman of the

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[43] In the *United States Department of Defense* case, *supra*, p. 9, n. 10, the FCC was concerned with dial restoration panels "primarily related to [an] interstate national defense purpose" which the FCC itself found "different in essential respects" from ordinary telephone sets. *Id.* at 813. *AT&T-TWX*, 38 F.C.C. 1127 (1965), involved teletypewriter equipment "predominantly interstate in its use" and the FCC held that the equipment did not pertain to "telephone exchange service." *Id.* at 1129, 1133-34. *Carterfone* involved not ordinary terminal equipment but a device "for interfacing the public telephone system with private mobile radio systems." 13 F.C.C.2d 432. Even that decision, like the other four cases cited by the majority opinion (Pet. App. 16a), carefully limited the FCC's assertion of jurisdiction to those uses of the devices in question for interstate and foreign operations, the very limitation which the FCC has specifically abandoned both in *Telerent* and in its registration program.

[44] The collection of cases cited at pp. 21-22, n. 33, above, is merely a sampling of state regulatory cases involving terminal equipment. In fact, state tariff filings and state administrative proceedings affecting terminal equipment go on all the time.

FCC responded to a Congressional inquiry about modification of the telephone by stating:

> "[W]e . . . lack primary jurisdiction over telephone sets which are a primary part of the facilities used in providing exchange telephone service. As you know, the Communications Act specifically excludes the Federal Communications Commission from any authority with respect to charges, classifications, practices, services, facilities or regulations for or in connection with intrastate and exchange telephone services of any telephone company; such local service matters are subject to the regulatory authority of State commissions and the various states." 119 Cong. Rec. 30962.[45]

Nothing has changed since 1973 except the FCC's present unwillingness to obey the statute; and the FCC's longstanding inaction and acquiescence in state regulation deserve substantial weight as compared with its "recent *ad hoc* contention as to how the statute should be construed."[46]

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[45] The FCC in 1968 made essentially the same point in construing a parallel exemption: "When the Communications Act was enacted in 1934, Congress was concerned that the telephone might be considered an instrumentality of interstate commerce merely because of the circumstance that every telephone can be connected with a toll line for interstate calls. . . . Congress agreed with the USITA position that 'the tail should not wag the dog.' " *General Telephone Co. of California*, 14 F.C.C.2d 695, 696 (1968).

[46] *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956); *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272, 281 (1966). This Court further stated, in *FTC* v. *Bunte Bros., supra*: "But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it is equally significant in determining whether such power was actually conferred." 312 U.S. at 352.

3. The majority opinion below is mistaken in its basic approach to the common carrier provisions (Title II) of the Communications Act. It assumed both implicitly and explicitly that Congress empowered the FCC to exercise a general dominance over telephone policy in the United States, relegating the states to a subordinate and interstitial role.[47] The majority opinion failed to recognize that, whereas Congress may have established such a broad federal superintendence over broadcasting and radio transmission under Title III of the Act, it adopted a quite different and more restrictive approach in *dividing* authority over common carrier regulation in Title II.

Thus, Title III of the Act reflects the technological need for central control of the airwaves and of broadcasting; Section 301 in fact extends the radio licensing authority even beyond interstate communication to intrastate radio transmission that may merely interfere with interstate uses and Title III contemplates no substantial role for direct state regulation. By contrast, numerous limitations on the Title II powers of the FCC reflect the predominantly local use of telephone service and the intention to preserve existing, comprehensive state regulation. Congress not only expressly reserved intrastate and exchange matters to the states, but it withheld from the FCC jurisdiction over telephone matters that are explicitly interstate by the very terms of the Act. See, *e.g.*, Section 221(b).[48]

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[47] The majority opinion specifically relies, for example, on the FCC's alleged "plenary jurisdiction" over interstate and foreign services, the supposed need for "comprehensive regulation," and federal predominance purportedly reflected in Section 410(c). Pet. App. 12a, 15a, 18a.

[48] Titles II and III had quite different origins. The latter was largely a re-enactment of the Radio Act of 1927, with regulatory

Thus, like the Natural Gas Act, Title II was framed to create a plan of *dual* federal and state regulation, federal power "being complementary in its operation to . . . [the regulatory schemes] of the states and in no manner usurping their authority." *Panhandle Eastern Pipe Line Co.* v. *Comm'n,* 332 U.S. 507, 520 (1947).

The common carrier matters reserved to the states were not deemed minor or trivial: they included *inter alia* all "charges, classifications, practices, services, facilities, or regulations" for or in connection with intrastate or exchange telephone service; and Congress well knew that intrastate and exchange telephone communications represented "97½ or 98 percent" of the business.[49] The emphatic language chosen by Congress to preserve this state jurisdiction did not contemplate that the FCC could override state policies in the reserved area. The Act was specifically designed, in light of experience with railroad regulation, to prevent that result by retaining "exclusive" jurisdiction in the states. S. Rep. No. 781, *supra,* at 3.

Even under Title III, this Court has cautioned that claims of federal preemption "cannot be judged by

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power over broadcasting being transferred from the Commerce Department to the new agency. Although there had been limited, dormant ICC power to regulate telephone companies, Title II was essentially a new measure.

[49] 78 Cong. Rec. 10816. As both the FCC (Pet. App. 21b)and the opinion below (Pet. App. 9a) have admitted, Congress was equally aware that, despite this predominant intrastate usage, practically all terminal equipment could be used intermittently for interstate use. *Doniphan Tel. Co.* v. *AT&T*, 34 F.C.C. 950, 967 (1962), *aff'd,* 34 F.C.C. 949 (1963). Yet Congress deliberately chose to reserve intrastate and exchange matters to the states and to include the term "facilities" in addition to the term "charges" in Sections 2(b)(1) and 221(b).

reference to broad statements about the 'comprehensive' nature of federal regulation under the Federal Communications Act." *Head* v. *New Mexico Board,* 374 U.S. 424, 429-30 (1963) (footnote omitted). Under Title II the very notion of "comprehensive" federal regulation is inapplicable when the issue presented is the FCC's power *vis-a-vis* state regulation.[50] Thus, the implicit and explicit reliance by the majority opinion in this case on the supposed intent to confer "plenary jurisdiction" and assure "comprehensive regulation" (Pet. App. 12a, 18a) is both incomprehensible and patently erroneous.

4. Lastly, the majority opinion ignored this Court's repeated warning that state and local control over matters long regulated at that level should not be superseded without the clearest expression of Congressional intent. "As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated . . . ."[51] This rule simply reflects Congress' own policy of preserving state authority over "matters heretofore traditionally

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[50] See *Kitchen* v. *FCC,* 464 F.2d 801 (D.C. Cir. 1972) (Section 221(b)); *NARUC* v. *FCC,* 533 F.2d 601 (D.C. Cir. 1976) (Section 2(b)(1)); *Southwestern Bell Tel. Co.* v. *United States,* 45 F. Supp. 403 (W.D. Mo. 1942) (Section 221(b)). It is notable that this Court's references to the broad scope of FCC powers refer almost invariably to its powers over broadcasting and CATV, both of which are regulated under Title III. See, *e.g., United States* v. *Southwestern Cable Co.,* 392 U.S. 157 (1968).

[51] *Maurer* v. *Hamilton,* 309 U.S. 598, 614 (1940). See also numerous cases cited at p. 21, n. 32, and quotations below. In *Maurer,* the Court took particular note of Congress' rejection of broader language in framing the statute in question (*id.*), which parallels Congress' treatment of the Communications Act. Compare pp. 29-30, above.

left to local custom or local law." *FTC* v. *Bunte Bros., Inc.*, 312 U.S. 349, 354 (1941).

Assuredly, there is no "clear and manifest purpose of Congress"[52] to oust state control over terminal equipment. On the contrary, the language of the Act, its structuring of Title II authority, its legislative history, and administrative practice since its passage show that Congress intended state regulatory power to "remain unimpaired." 373 U.S. at 152. The lower court's approach to the statutory construction question is thus inconsistent with the decisions of this Court —decisions which were cited to the court below but which the majority opinion did not even discuss.

[52] *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 146 (1963), quoting *Rice* v. *Board of Trade*, 331 U.S. 247 (1947).

CONCLUSION

For the reasons stated, certiorari should be granted and the case set for plenary review by this Court.

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